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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No. 50

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36,

Petitioners,

vs.

J. S. GARMON, J. M. GARMON and W. A. GARMON,

Respondents.

OPENING BRIEF OF PETITIONERS.

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OPINIONS BELOW.

The opinion of the Fourth District Court of Appeal of the State of California is unreported but found in 127 A.C.A. 320. The opinion of the Supreme Court of the State of California is reported in 45 Cal. 2d 657.

JURISDICTION.

The judgment of the Supreme Court of the State of California was entered on December 2, 1955. A timely petition for rehearing was filed and denied on December 28, 1955. A petition for a writ of certiorari was filed on March 22, 1956 and granted on May 7, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATUTE INVOLVED.

The statutory provisions involved are the Taft-Hartley Act (Labor Management Relations Act, 1947, 29 U.S.C. 141, et seq.).

QUESTIONS PRESENTED.

The conclusions of the Supreme Court of California pose the following questions:

1. May a state court under the Taft-Hartley Act enjoin peaceful picketing of an interstate employer in a case where the Board has declined to exercise jurisdiction, when the court could not do so if the Board had not so declined?

2. If the answer to (1) is in the affirmative, may a state court do so on grounds the picketing though lawful under state law is an unfair labor practice under the Act?

3. If the answers to (1) and (2) are in the affirmative, may a state court do so where the alleged unfair labor practice consists of picketing for a union shop

by a union not "designated" by the Board when the Board has declined to hold a representation election and the State of California has no statutory procedure for doing so?

4. If the answers to (1), (2) and (3) are in the affirmative, does refusal by the Board's regional director to institute representation proceedings, without any attempt to review such refusal, vest the state court with jurisdiction in an unfair labor practice case?

STATEMENT OF THE CASE.

Plaintiffs below are partners engaged in the business of selling lumber and building materials. Defendants below are the San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Drivers, Local 36. About November 15, 1952, the unions requested a labor agreement with plaintiffs under one of the terms of which certain employees were required to make application for membership in the unions within thirty (30) days after hiring (R. 2).

The company refused to sign the agreement on the ground it would be a violation of the Act so to do before its employees or an appropriate unit thereof designated a union as their collective bargaining agent (R. 14). Thereafter, the unions commenced peaceful picketing at the company's place of business (R. 14). The picket carried a banner of moderate size upon which appeared the following: "A. F. of L.

Picket Millmen's Union 2020, Teamsters' Union 36 invites employees to join." (R. 32).

Plaintiffs brought an action on May 7, 1953 in the Superior Court of San Diego, California, a court of general jurisdiction, to enjoin defendants from picketing their place of business and for damages (R. 1). They alleged they were in interstate commerce, and that the contract requested of them would violate the Taft-Hartley Act since none of the unions had been certified by the Board.

Defendants by way of both demurrer and answer raised the question that the Superior Court had no jurisdiction since their activities, if illegal at all, were within the exclusive jurisdiction of the Board (R. 5). Defendants further, by way of answer, raised the issue that plaintiffs failed to exhaust their remedies under the Act (R. 8).

On the same day (May 7, 1953), plaintiffs mailed to the regional director of the Board a letter and petition requesting the Board to determine the appropriate unit for voting and to hold the representation election (R. 191 and 196). This the regional director refused to do. Plaintiffs did not appeal from this refusal.

Speaking of this refusal, the trial court in its opinion stated:

> "I have looked at these papers here and we talk about small business and we have these Congressional Committees, which their constituents think are going to protect small businesses, and I consider this lumber yard in Escondido would certainly be in the category of a small

business, and yet we have these federal agencies and when these small businesses file a petition with them to get relief in a certain case in which I think they would be entitled to relief, and some examiner up there perfunctorily turns the petition down and says that if you are not satisfied with the decision, you can appeal it to Washington, D. C., and by the time you get there, with all the matters pending back there, everybody would be dead and gone by the time they ever found the file." (R. 312).

* * * * * * *

"But in this case the petition was filed and I think the application was justified, and, as I have said, they were turned down by this examiner and he tells them they can apply to Washington if they are not satisfied." (R. 313).

* * * * * * *

"In any event, I think the petition was proper and personally, I think it should have been granted." (R. 313).

This opinion of the trial court was rendered on June 2, 1953, before *Garner et al. v. Teamsters, Chauffeurs & Helpers Local 776*, 74 S. Ct. 161, was decided.

Plaintiffs filed no unfair labor practices with the Board, their attorney testifying that:

"We were doubtful that any unfair labor practice by the unions was being committed in so far as the picketing of the plant of the plaintiff in this case was concerned." (R. 200-201).

The trial court found that company operations affected interstate commerce in that it sold over $250,000.00 worth of materials originating and manu-

factured out of California (R. 13); that the purpose of the picketing was to force execution of the foregoing labor agreement (R. 14), and that the Board refused to accept jurisdiction for the purpose of a representation election (R. 16). It made no finding relative to the failure of the plaintiffs to file an unfair labor practice charge. It applied the Taft-Hartley Act, awarded plaintiffs one thousand ($1,000.00) dollars damages and enjoined defendants from picketing and engaging in various other activities in order to require plaintiffs to discriminate with respect to conditions of employment by reason of membership or lack thereof in the unions, until one or more of the unions had been designated as the collective bargaining representative of plaintiffs' employees (R. 16-17). Since the State of California has no statutory administrative procedure for union designation, the trial court in effect forbade picketing until such time as the Board would assume jurisdiction, determine the appropriate unit, order the election and certify the results thereof.

The unions appealed to the District Court of Appeal, Fourth District, of the State of California, contending in substance that the Superior Court had no jurisdiction to enjoin activities contended to be an unfair labor practice under the Act; that the unions' requested contract and their conduct was entirely lawful and proper under California law; and that the Gammons had failed to exhaust their remedies before the Board.

The appellate court in a unanimous opinion on August 24, 1954 (127 A.C.A. 320) (R. 30) reversed

the trial court holding in substance that while the claimed objectionable conduct of the unions was defined in the Act as an unfair labor practice, there was no state statute making it unlawful and therefore the state court had no jurisdiction. The court relied on *Garner et al. v. Teamsters, Chauffeurs & Helpers Local 776*, 74 S. Ct. 161 (R. 35). The appellate court further concluded that since the Board had jurisdiction to determine plaintiffs' right to injunctive relief, the state court as such was without jurisdiction until plaintiffs exhausted their administrative remedy.

The Garmons thereupon appealed to the Supreme Court of the State of California.

The Supreme Court of California on December 2, 1955 (45 Cal. 2d 657) (R. 43) rendered a four to three decision holding in substance that where the board declines to exercise its jurisdiction because of its jurisdictional yardsticks, such action amounts to a declaration that national labor policy will not be jeopardized if a state court assumes jurisdiction and enforces the Act. The majority reasoned that otherwise Congress would be denying a remedy to employers over whom the board declines to exercise jurisdiction. Consequently, Congress intended to give state courts jurisdiction to enforce the Act in such circumstances.

The Supreme Court failed to make a distinction between exercising jurisdiction on the one hand in a representation case and on the other in an unfair labor practice case.

The strong dissent held the foregoing reasoning to be fallacious because:

> "(1) The national board and the powers granted to it are an integral part of the federal law and that law is not intended to have application in a situation where the board plays no part; it is inescapable that the federal law is to be administered by the board, not by the state courts. (2) The board in refusing jurisdiction as it has power to do, has in effect determined that the federal law should not apply in this case. (3) It is neither feasible nor fair to apply the federal law. (4) There has not been such a refusal to exercise jurisdiction by the board here as to justify the conclusion that the state court has jurisdiction." (p. 668).

SUMMARY OF ARGUMENT.

If respondents' business had fallen within the Board's jurisdictional yardstick, the court below would have had no jurisdiction in this case to grant injunctive relief or damages.

The same restriction is applicable where the Board declines to exercise its jurisdiction because:

1. The Act shows an intent to prohibit state assumption of jurisdiction without a cession agreement with the Board; and

2. The policy of the Act requires application of preemption doctrine with respect to industries affecting interstate commerce, since such attempted state regulation:

(a) conflicts with the pattern of regulation imposed by the Act;

(b) conflicts with the Act's policy of protecting concerted activities;

(c) destroys the "balance" of the Act; and

(d) causes intolerable confusion.

The assumption of jurisdiction by the states is not justified on the ground that otherwise labor relations will go unregulated in the field of interstate commerce because fundamentally such relationships should be the result of free and unrestrained collective bargaining unless gross inequities result in which event it more properly is a subject matter for consideration by Congress and not piecemeal approach by numerous state tribunals.

In any event, the court below was without jurisdiction because there had been a complete failure to exhaust existing detailed administrative remedies. It is a fallacy to assume that since a representation hearing had not been granted an unfair labor practice charge, if made, would be similarly treated.

ARGUMENT.

I. IF RESPONDENTS' BUSINESS HAD MET THE BOARD'S JURISDICTIONAL YARDSTICKS, THE STATE COURT WOULD HAVE HAD NO JURISDICTION IN THIS CASE.

If, instead of allegedly arising in an area from which the Board has temporarily withdrawn its jurisdiction, this case had arisen within the domain

marked out by the Board's present jurisdictional yardsticks, the jurisdiction of the court below both to grant injunctive relief and to award damage would have been preempted by the Act.

A. The court below would have been without jurisdiction to grant injunctive relief.

As to the jurisdiction of a state court to enjoin activity which is or may be an unfair labor practice under the Act, this case falls within the ruling of this Court in *Garner et al. v. Teamsters, Chauffeurs & Helpers Local 776*, 74 S.Ct. 161, as extended and applied in *Building Trades Council et al. v. Kinard Construction Company*, 74 S.Ct. 373.

In the *Garner* case, this Court held the Act precluded a state court from issuing an injunction on the basis of state law restraining picketing, even though that activity might have been an unfair labor practice under the Act. It made clear that where concerted activity may come within the orbit of unfair labor practices described in the Act, the procedures of the Board, whether applied or not, were intended to be exclusive.

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administra-

> tion of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid those diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. * * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law * * *" (*Garner* case, *supra*, at pages 165-166).

In the *Kinard* case, this Court made clear the application of the *Garner* rule to a situation where, like the present, a state court sought to enjoin concerted activity not because it was in violation of state law, but because it was found to be an unfair labor practice under the Act. The Supreme Court of Alabama had upheld the jurisdiction of an Alabama court to enjoin activity on grounds it was an unfair labor practice under the federal Act. This Court reversed *per curiam*, citing *Garner*.

The California Supreme Court recognized that the *Garner-Kinard* rule would have governed this case had it arisen under the Board's yardstick. The court stated:

> "The National Labor Relations Board has exclusive primary jurisdiction to prevent unlawful demands. (Weber v. Anheuser-Busch, Inc., 75 S.Ct. 480; Garner v. Teamsters, Chauffeurs & Helpers, etc., 74 S.Ct. 161; United Const. Workers v. Laburnum Const. Corp., 74 S.Ct. 833; Bethlehem Steel v. N. Y. State LRB, 67 S.Ct. 1026.) The purpose of the picketing was to

compel the company to sign an agreement which included a clause requiring the employer to encourage membership in the unions. In the circumstances here shown, under the Labor-Management Relations Act, this was an unfair labor practice." (*Garmon*, supra, at page 661).

B. The Court below would have been without jurisdiction to grant damages.

Petitioner submits the theory of the *Garner* and *Kinard* cases would also preclude the court below from granting recovery for general damages as an incident to injunctive relief, if this case had arisen within the Board's yardsticks.

Section 303(b) of the Act vests courts, apparently both federal and state, with jurisdiction to grant recovery for damages sustained by reason of acts specified in Section 303(a). Such acts are also unfair labor practices under Section 8(b), but there are several 8(b) unfair labor practices which are not included in 303(a). It is clear that Congress intended to permits courts to grant damages for certain named unfair labor practices and no others. Activity prescribed by Section 8(b)(2), which covers the instant case, is one type of activity which is not included in 303(a); therefore, it cannot form the basis of a damage suit in a state court.

The principle of the *Garner* case supports this conclusion. This Court made clear the important distinction, in this context, is not between public rights and private rights, but between "the legal rights or duties enforced through the administrative process

and those left to enforcement on private initiative in the law courts" (*Garner* case, *supra*, page 168).

For a state court to grant damages for all activity within the scope of the Act, is as much an interference with federal regulation as for a state court to grant an injunction. Exposure to liability for damages is as powerful a restraint on conduct as is a threat of injunctive relief. For this reason, the granting of damages is as regulatory, in the sense of affecting conduct, as the granting of injunction.

The situation is different, of course, where the state is confronted with activity such as violence, which states have traditionally regulated under their police power (*United Construction Workers v. Laburnum*, 74 S.Ct. 833). But the instant case is not that sort.

II. THE SAME RULES OF PREEMPTION ARE APPLICABLE WHERE THE BOARD FAILS TO ASSERT ITS COMPLETE JURISDICTION.

The broadest possible question presented by the instant case is whether the rules of federal preemption which this Court has evolved in recent cases are limited to that area within the Board's present jurisdictional yardsticks, or whether they are applicable to all employment relations which affect interstate commerce.

A. The Act shows an intent to prohibit State assumption of jurisdiction without cession from the Board.

Any suggestion that Congress intended the Board to be able to cede jurisdiction to the states by con-

tracting its jurisdictional yardsticks is negated by Section 10(a) of the Act which reads as follows:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

The proviso relating to cession was added in 1947 in order to resolve doubts cast by this Court in *Bethlehem Steel Co. v. N. Y. S. L. R. B.*, 67 S.Ct. 1026, on the power of the Board to cede jurisdiction to the states (1 *Legislative History of the Labor-Management Relations Act of 1947,* 500). In *Bethlehem,* a majority of this Court held a state labor relations board had no jurisdiction in a representation case involving foremen over which the Board had declined jurisdiction because of the policy of the latter that a unit of foremen was inappropriate for collective bargaining. The majority opinion reserved

the question of the effect of the Board's declination of jurisdiction for budgetary or other reasons. Three members of this Court, dissenting, did, however, express an opinion on the subject, saying:

> "If such cooperative agreements between State and National Boards are barred because the power which Congress has granted to the National Board ousted or superseded State authority, I am unable to see how State authority can revive because Congress has seen fit to put the Board on short rations." (*Bethlehem, supra,* p. 1033).

Congress in the 1947 amendment to Section 10(a) wished to make clear that the Board could, under certain circumstances, cede jurisdiction to a state. Though obviously aware of the Board practice of declining jurisdiction and of the implications of the language of this court quoted immediately above, the framers of the 10(a) proviso provided only one method by which a state could assume jurisdiction in interstate commerce—cession by agreement with the Board.

Certainly this supports the presumption that other means of obtaining jurisdiction were excluded; and this presumption is further strengthened by the conditions imposed upon cession.

Section 10(a) spells out the conditions under which cession agreements can be entered into by the Board with the states. Under no circumstances can the Board cede jurisdiction to the states in the mining, manufacturing, communications and transportation industries, where firms or facilities within these categories have a substantial relationship to inter-

state commerce. In so far as other industries are concerned, it would appear that the Board has a *limited leeway* to cede jurisdiction via "an agreement" to the states over certain cases which affect interstate commerce. However, regardless of the industry, the Board may not cede jurisdiction over cases affecting interstate commerce if "the provision of the State * * * statute applicable to the determination of such cases by such agency is inconsistent" therewith. Thus, unless the state statute measures up to the standard of consistency, the Board, under the express terms of Section 10(a), is forbidden to enter into a cession agreement with a state.

Obviously, the reason why Congress included the consistency test was to insure uniform application of national labor policy within interstate commerce.

In this connection, the Senate Labor Committee which reported the Taft-Hartley in 1947 stated:

> "The provision which has been added to this subsection permits the National Board to allow State labor-relations boards to take final jurisdiction of cases in border-line industries (that is, border-line in so far as interstate commerce is concerned) provided the state statute conforms to national policy." (S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 26 (1947)).

Fully aware of the language and legislative history of Section 10(a), the Board to date has not found it possible to enter into a cession agreement with any state. The reason for this situation is that no state labor law corresponds closely enough to the federal law to satisfy the requirements of consistency. Cali-

fornia, for example, does not even have an approximation of the federal Act.

That this Court has agreed with this interpretation of Section 10(a) is indicated by its opinion in *Amalgamated Association etc. v. Wisconsin Employment Relations Board*, 71 S.Ct. 359, in which it said, at page 367:

> "When it amended the Federal Act in 1947, Congress * * * was well * * * aware of the problems in balancing state-federal relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co. v. New York Labor Board*, (1947) 330 U.S. 767, 67 S.Ct. 1026, 91 L.Ed. 1234, and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states."

In a footnote to this statement, the Court, after citing Section 10(a) of the Act as amended by Taft-Hartley, said:

> "A proviso of 10(a) authorizes cession of jurisdiction to the states only where the state law is consistent with the federal legislation. This insures that the national labor policy will not be thwarted even in the predominantly local enterprises to which the proviso applies. S. Rep. No. 105, 80th Cong., 1st Sess., 26 (1947). See also minority views to the same report, *id.*, pt. 2, 38, agreeing as to this feature of the legislation."

The text then continues:

> "Congress knew full well that its labor legislation 'preempts the field that the act covers inso-

> far as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative."

Similarly, in *Algoma Plywood & Veneer Co. v. W.E.R.B.*, 69 S.Ct. 584, at page 591 this Court stated the purpose of 10(a) was:

> "* * * to meet situations made possible by *Bethlehem Steel Co. v. New York S.L.R.B.*, 330 U.S. 767, 67 S.Ct. 1026, 91 L.Ed. 1234, *where no State agency would be free to take jurisdiction of cases over which the National Board had declined jurisdiction.*" (Citations omitted; emphasis added)

This has also been the Board's interpretation of 10(a). Thus, in *Punch Press Repair Corporation*, 89 NLRB 614, the board said:

> "Despite the Board's desire for the greatest possible comity with State boards, it lacks power under the present statute to divest itself of jurisdiction, except in conformity with Section 10(a) of the amended Act."

From 1948 onward the Congress, through its committees dealing with this problem, has clearly indicated its view that state regulatory action is foreclosed with respect to enterprises over which the Board has declined to assert jurisdiction. In 1948, the Joint Committee on Labor Management Relations, appointed pursuant to Title IV of the Act, commented on the desirability of making specific provi-

sion to permit state regulation of labor disputes over which the Board was refusing to assert its legal jurisdiction (S. Rep. No. 986, 80th Cong., 2nd Sess., Part I, pp. 30-31). The committee concluded that amendment of the Act would be necessary to enable the states to act in this area, and that, if such an amendment "would permit inconsistent regulations and as many different policies as there are states having labor relations Acts, the desirability appears questionable." Subsequently, bills were introduced in Congress to permit the states, without regard to Section 10(a), to exercise jurisdiction where the Board declines to act (S. 1264, 83rd Cong., 1st Sess., 99 Cong. Rec. 1845-1848 (1953); S. 2650, 83rd Cong., 2nd Sess., 100 Cong. Rec. 91, 100 Cong. Rec. 5194, 5284; S. Rep. No. 1211, 83rd Cong., 2nd Sess. (1954)). None has been enacted.

In its first session, the Eighty-third Congress rejected an amendment to the Act proposed by Senator Ives which would have provided, in this connection:

> "(2) Nothing in this Act shall be deemed to prevent or bar any agency, or the courts of any State or Territory, from assuming or asserting jurisdiction over labor disputes over which the Board has declined * * * to assert jurisdiction."

Senate Report No. 1211, known as the Smith Bill *(supra)*, was considered by the Senate Labor Committee of the Eighty-third Congress at its second session in 1954. The reports of both the majority and minority members were in agreement that, under

present law, state regulation in this area was precluded under the established principles of federal preemption. For this reason the bill was recommitted for the purpose of making specific provision granting power to the states, should a majority of the committee so desire (S. Rep. No. 1211, 83rd Cong., 2nd Sess. (1954); Cong. Rec. p. 2650). No such provision was made.

Both the language of Section 10(a) and its subsequent interpretation by Congress and the Board preclude, therefore, the possibility that states gain jurisdiction by the Board's refusal to act.

B. The design of the Act requires application of the same doctrines of preemption throughout interstate commerce.

Not only the language of Section 10(a), but also the general design of the Act and of the policies behind it argue for the application of the same standards of preemption throughout interstate commerce, regardless of Board inaction. State regulation in the area of Board retreat would infringe upon federal labor policy in at least four ways: (1) it would conflict with the pattern of regulation imposed by the Act (2) it would conflict with the Act's policy of protecting concerted activities (3) it would destroy the balance of the Act (4) it would cause intolerable confusion.

1. State regulation would conflict with the federal pattern of regulation.

The reasoning behind this Court's decision in the *Garner* case was that if states were permitted to enjoin activity regulated by the Act, conflicts would

likely arise between decisions of the state courts or boards and those of the Board—not only from differences in so-called "substantive" law, but also from differences in procedure, fact finding and remedies. The congressional policy of a uniform system of industrial law of necessity prevents a state from enjoining activity even though it might also be an unfair labor practice under the Act.

Similar policies apply in that area where the Board declines to exercise jurisdiction. In that area as well, decisions by state tribunals are likely to differ substantially from federal labor policy as administered by the Board, even though the state tribunals apply a similar or identical statute. Thus, even though the Board's failure to exercise jurisdiction removes one type of conflict, namely, between possible decisions of different tribunals as to the same case, another very important type remains: conflict between the *policy* of the Act and that of the state tribunal.

The instant case is an example of such a conflict. Section 8(b)(2) of the Act makes it an unfair labor practice for a union to "cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *" Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate in employment because of nonmembership in a union unless pursuant to a union shop agreement with a labor organization which:

> "* * * is the representative of the employees as provided in section 9(a) in the appropriate col-

lective bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding 12 months received from the Board a notice of compliance with sections 9(f), (g) and (h)."

In the instant case, it is clear the various decisions below all proceeded on the theory that petitioner's activity was an unfair labor practice under Section 8(b)(2), because the union had not been "properly designated". But the State of California provides no statutory procedure for holding elections to determine employee choice of unions and their subsequent proper designation. Even were a court to institute such a procedure, it would certainly be substantially different from that conducted by the Board—an expert agency equipped to deal with the subtleties of labor relations.

The trial court's finding that the union did not represent the majority of the respondent's employees was based first on testimony by the employer's yard foreman, a relative of the Garmons (R. 125) who participated in a meeting of the employees at which the union was discussed; and on the fact that the union produced none of the employees to testify (R. 314-315).

The foreman's testimony was as follows:

"A. At that time we decided to leave it up to Bill and Stewart and Max, whether they wanted the union to enter.

The Court. Leave it up to who?

A. To Mr. Garmon (R. 120).

* * * * * * *

"Q. And that would mean the management?
A. Yes. (R. 129).

* * * * * * *

"Q. The question, I believe, that was pending to which an objection was made and overruled was: Did you discuss at the second meeting among yourselves as to whether or not you wanted to join the union?

A. Yes.

Mr. Whelan. Same objection as heretofore stated.

The Court. Overruled.

By Mr. Archer. Q. What was decided?

A. No. We decided we didn't want to." (R. 121).

There was no actual election let alone control of the election by an impartial agency; no outside observers of the election process; no determination of eligible voters; no guarantee of secret ballot; no opportunity to object to the method of election, if improper; no determination of an appropriate unit; and no certification—all of which safeguards would have been provided by the Board procedure.

The importance of these safeguards is nowhere more vividly illustrated than in the following extract of the opinion of the trial court:

"Now if there is any question about what transpired out there between the Garmons and their employees, there has been a lot of testimony introduced, but there have only been two employees brought in here. One was the foreman and one the gentleman sitting back there now. I think there are about six or seven others. If the unions

thought that the Garmons had coerced the employees not to sign up with the union, there is a good way to prove that under Section 2055 of the Code of Civil Procedure, as amended in 1951. That is the examination of an adverse party. It says:

> 'A party to the record of any civil action or proceeding or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent, member, agent, employee, or managing agent of any such party or person, or the agent, officer or employee of a municipal corporation which is a party to the action or proceeding, may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses.'

Now certainly the employees of the Valley Lumber Company would come under that section as amended in 1951, and if there is any question as to whether or not the employers coerced these employees into not designating the union as their bargaining agent, they could have been brought in and examined under oath, and I would have made them answer and I would have made them answer truthfully, as far as I could.

But none of these employees have been brought in, and therefore I must assume that they weren't coerced." (R. 314-315.)

This Court has had occasion to point out the "implications of exclusiveness" which inhere in board certifications. *Weber v. Anheuser-Busch, Inc.*, 75 S. Ct. 480, at 485.

Furthermore, the State of California has no agency capable of making any determination as to what unit is "appropriate" for purposes of collective bargaining. And even were a court to undertake that function, it is quite probable its determination would be different from that of the Board.

Thus, to take just the example of this case, if states were permitted to enforce Section 8(b)(2), or even a state statute identical thereto, the results would almost certainly be at variance with federal policy, at least in a state which has no labor relations act or agency.

2. State regulation like that attempted by the Court below conflicts with the Act's policy of protecting concerted activities.

Section 7 of the Act reads as follows:

> "Employees shall have the right to self-organization, to form, join, of assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

It has been decided by this Court that Section 7 of the Act protects concerted activities, not only against employer action, but against state action as

well. *Hill v. Florida*, 65 S.Ct. 1373. In the case of employer action, the sole jurisdiction to protect concerted activities lies with the Board; but in the case of state action, protection is not, and indeed, cannot, be dependent upon the Board for enforcement. Therefore, there is no reason to limit protection of Section 7 activities as against the state to those cases which fall within the Board's jurisdictional yardsticks; and Congress has not so limited it.

Thus, in *International Union etc. v. W.E.R.B.*, 69 S.Ct. 516 this Court said of Section 7, at page 523:

> "In the light of labor movement history, the purpose of the quoted provision of the statute becomes clear. The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal. Section 7 of the Labor Relations Act took this conspiracy weapon away from the employer in *employment relations which affect interstate commerce*. No longer can any state, *as to relations within reach of the Act*, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert." (Emphasis ours.)

This position—that Section 7 activities are protected throughout the reach of the Act—was reiterated by this Court in its recent decision in *U. M. W. v. Arkansas Oak Flooring Co.*, 76 S.Ct. 559. In holding that "elimination of the Board" by non-compliance with Section 9(f), (g) and (h) "does not * * * elimi-

nate the applicability of the National Labor Relations Act, as amended," this Court said, at page 566:

> "The industrial relations between the company and its employees nonetheless *affect interstate commerce* and come within the field occupied by the National Labor Relations Act as amended. The Labor Board is but an agency through which Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and unions are controlled by its applicable provisions and all courts, state as well as federal are bound by them." (Emphasis ours.)

In view of this Court's decision in *Garner* and *Kinard,* the meaning of this passage seems clear. The sense in which state and federal courts are "bound" by the Act is not that they are bound to enforce it, for this Court has held in *Kinard* that states have no such jurisdiction. On the contrary, they are bound in the sense that they may not infringe upon activities protected by the Act in the case of industrial relations which affect interstate commerce.

Thus, Professor Cox states of the *Garner* case:

> "* * * the only reason for excluding the application of state law was the danger that the state tribunal would reach a conclusion at variance with national policy by enjoining picketing which the NLRB might well have found not to be an unfair labor practice." (67 *Harvard Law Review* 1297, at page 1312.)

And this Court itself stated, at pages 170, 171 of the *Garner* case:

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing, but only that *ascertained by prescribed processes* to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." (Emphasis ours.)

Whether or not an activity is protected is a question which Congress intended to leave to the Board.

Thus, in the instant case, petitioners' activity was deemed to be unprotected because its object was to obtain employer agreement to what was, under the circumstances, an agreement invalid under the Act. But petitioners contended in the trial court that their object was merely to organize the employees. Their members picketed carrying signs reading "A. F. of L. Picket Millmen's Union 2020, Teamsters' Union 36 invites employees to join." Yet the trial court, without any special experience in labor relations and without the investigatory and fact-finding procedures of the Board, speculated otherwise. It may be that if the case arose before the Board, it would have found the

facts to be in the petitioners' favor. This is an instance of the danger of permitting a state to find union concerted activity to fall within the prohibitions of the Act. In the instant case, the union is restrained from picketing for a union shop contract "unless and until defendants, or any one or more of them, have been properly designated as the collective bargaining representative of plaintiffs' employees or an appropriate unit thereof." (R. 25.) California provides no statutory procedure by which the union can become "properly designated".

The trial court, apparently, felt lack of designation was somehow the union's fault; the judge suggested

> "I think the proper procedure for the union would have been to cooperate in getting the National Labor Relations Board to get somebody down here to determine whether these employees wanted the union in question to represent them * * *" (R. 315-316.)

The unions are left, however, without any means of complying with the injunction in the absence of exercise of jurisdiction by the Board.

The decision of the court below, which proceeds on the theory the union's picketing was prohibited by the Act, endangers rights protected by it.

3. State regulation like that attempted by the Court below destroys the balance of the Act.

Even assuming that, by some coincidence, the court below reached the same conclusion the Board would

have reached, had it considered the case, still the principle upon which the court purports to act conflicts with the Act's design of imposing a balanced scheme of regulation upon labor relations affecting interstate commerce.

The Act constitutes a deliberate weighing of regulation against regulation to achieve a delicate balance of labor and management rights and duties. If state courts are permitted to enforce one part of the Act, on the theory that they gain jurisdiction by Board inaction, how can they be required to enforce the *totality* of the Act in the absence of necessary machinery to accomplish this result?

4. State regulation like that attempted by the Court below causes intolerable confusion in determining jurisdiction.

A fourth reason why Congress intended the same standards of preemption to apply where the Board declines as where it exercises jurisdiction is the confusion which would result from making state action dependent upon the Board's changing jurisdictional yardsticks. The Board has made two general declarations of yardstick criteria, and has changed its mind on the interpretation and application of those yardsticks dozens of times.* Were state jurisdiction to depend upon Board yardstick policy, parties would

*For one example, see the excellent discussion of the Board's vacillation as to the taxicab industry in *New York State Labor Relations Board v. Wags Transportation System*, 33 LRRM 2855 (1954) (NYS).

be subject to one law one month and another law the next; the stability in labor relations which Congress intended to foster would be destroyed. This position was so well stated by a Michigan court that part of its opinion is worth calling to the attention of this Court:

> "If the jurisdiction of the state courts is to depend—not upon the act of Congress and the actual jurisdiction of the NLRB—but upon the day-to-day or month-to-month discretionary exercise of jurisdiction by the Board, dependent upon changing budgetary conditions or upon its economic, social or political views at the moment, then neither the courts nor the litigants can know with any certainty where jurisdiction lies, nor whether in a given case existing at the time of its commencement will continue until its final decision." (*Universal Car Co. v. Association of Machinists,* 35 LRRM 2087 at page 2098. (Mich. Court of Appeals, 1954.)

III. ASSUMPTION OF JURISDICTION BY THE STATES IS NOT JUSTIFIED UPON THE GROUND THAT OTHERWISE LABOR RELATIONS WILL BE UNREGULATED.

Those who would support state regulation often contend that the states must have the right to regulate the area in interstate commerce in which the Board does not act because otherwise labor relations are not regulated by government in that field. Yet this argument overlooks the whole basis of the American economy and the justification of the Taft-Hartley Act.

Labor-management relations in the United States and indeed, the economy of this country, rest upon the foundation of competition and free collective bargaining. To the extent that Congress regulated that field by the Taft-Harley Act it modified the freedom of action of the parties, but it certainly intended that government intervention proceed no further. In the absence of the effectuation of the Taft-Hartley Act by the board, the design of Congress preserved the free collective bargaining upon which the Act itself rested.

As Senator Taft himself said:

> "Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions." (93 *Cong. Rec.* 3835, 2 Leg. His. LMRA 1006.)

Indeed economic competition between unions and employers is one kind of solution of the problems of labor relations. It pre-dated the Taft-Hartley Act. It is the laissez faire of labor relations: the self-regulation of free competition.

Intervention by statute upsets the balance which results from the free working of these economic forces. Hence Congress, after the full presentation of the views of labor and management, designed a bi-lateral pattern of intervention, imposing rights and liabilities both upon employers and unions. The dual

pattern of regulation is delicately and finely adjusted, consisting of inter-related rights and duties.

To effectuate these rights and duties, Congress set up a Board with a specialized technique of control. Since the mechanism was of a single piece and the design whole and complete, it gave the Board exclusive power to apply or not to apply it in the field of interstate commerce.

If the mechanism of government regulation was *not* to be used by the Board, because in its judgment the working of the free competitive system in interstate commerce was not to be disturbed, the field remains free for the self-regulation of economic forces. In only two possible situations did Congress deliberately permit government intervention by states because of the peculiar circumstances there involved (Sec. 10a, 14b). It did this in no other, preserving the integrity of the instrument of control.

The piecemeal intervention of states, either to enforce federal rights or liabilities, as designed in the Act, or to impose their own regulations, would upset the balance of economic forces which Congress meant to preserve. The undesirability of state intervention when the Board decides to use and enforce the regulations of the Act is manifest; yet the effect of such intervention is the same when the Board declines to use the statutory regulation and to permit, instead, the self-regulation of free competition.

In any event, if self-regulation in the field renounced by the Board produces questionable social results, several legislative courses of action remain open.

The Board itself may fulfill its contemplated role by extending its activity into the whole field of interstate commerce rather than confining itself to the narrow area it now occupies. If the Board does not do so, and some need for statutory regulation remains, the states may adopt labor relations acts sufficiently similar to the federal Act to comply with Section 10(a). In such event the statutory regulation will accord with the national regulations established by the Act itself. If neither of these legislative steps suffice, Congress may enact such laws as it determines necessary; ultimately, the responsibility for an abridgement of the field of free enterprise and competition, beyond the present statutory limitations, rests with Congress and not with this Court.

IV. THE COURT BELOW WAS WITHOUT JURISDICTION IN THIS CASE BECAUSE THE ACTION OF THE REGIONAL DIRECTOR DID NOT CONSTITUTE REFUSAL BY THE BOARD TO ASSERT JURISDICTION OVER AN UNFAIR LABOR PRACTICE.

Even if the contentions above made are found erroneous and a state court may act in an area where the Board has declined jurisdiction, there was no such declination here.

After a representation petition was mailed to the regional office of the Board on the same day the instant case was instituted, and was rejected because of the jurisdictional yardsticks, not only did respondents not exercise the opportunity to appeal from the refusal of the regional director to issue a notice of representation hearing but in fact never filed an

unfair labor practice charge. The latter failure was admittedly the result of the conviction that regardless of the question of exercise of jurisdiction no unfair labor practice had in fact been committed (R. 200-201.)

Mr. Waddell, a law associate of counsel for the plaintiffs below testified:

> "We were doubtful that any unfair labor practice by the unions was being committed insofar as the picketing of the plant of the plaintiff in this case was concerned." (R. 200-201.)

Even if respondent had appealed from such determination of the regional director and the regional director's decision had been affirmed, still the Board's declination of jurisdiction in this case would not be clear. This is so for two reasons. First, the appeal from a regional director's dismissal of an unfair labor practice charge is heard by the general counsel rather than the Board as in a representation case. It not infrequently happens that these two bodies reach different conclusions. *Haleston Drug Stores v. NLRB, Smith, dba A-1 Photo Service v. NLRB,* 187 F. 2d 418 (C.A. 9) (1951) Cert. Den. 72 S.Ct. 29. Second, the charge most likely would have been dismissed because there was no unfair labor practice and the conduct of the unions would be protected activity. (cf. *Waddell* testimony, *supra.*)

In addition, this Court has frequently held that before a party may resort to the courts he must exhaust whatever administrative remedies are available to him. *Meyers et al. v. Bethlehem,* 58 S.Ct. 459. That

principle is applicable here. If this Court is to hold that states may act where the Board declines to act there must be some final and certain indication of such declination, together with the reasons therefor. Finally, the mere refusal by an intermediate official to assert jurisdiction in a different type of matter does not meet that standard. This argument is so well set forth in the opinion of the dissenting judges below that lengthy discussion of it here is unnecessary. 45 Cal. 2d 657 at pp. 675-676.

CONCLUSION.

For the foregoing reasons, the judgment of the court below should be reversed.

Dated, September 24, 1956.

Respectfully submitted,

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